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No. 86-1649

In The
Supreme Court of the United States
October Term, 1986

THE STATE OF OHIO; THE OHIO DEPARTMENT OF AGRICULTURE; DALE LOCKER, DIRECTOR OF THE OHIO DEPARTMENT OF AGRICULTURE; ERIC NELSON, HARDIN COUNTY BEE INSPECTOR,

Appellants,

v.

WILLIAM P. ALLINDER AND CAROLINE I. ALLINDER D/B/A SUNNYSIDE BEE FARM; ELMER J. STEINER AND MARILYN L. STEINER,

Appellees.

On Appeal From
The United States Court Of Appeals
For The Sixth Circuit

MOTION OF APPELLEES WILLIAM P. ALLINDER AND CAROLINE I. ALLINDER D/B/A SUNNYSIDE BEE FARM AND ELMER J. STEINER AND MARILYN I. STEINER TO DISMISS OR AFFIRM

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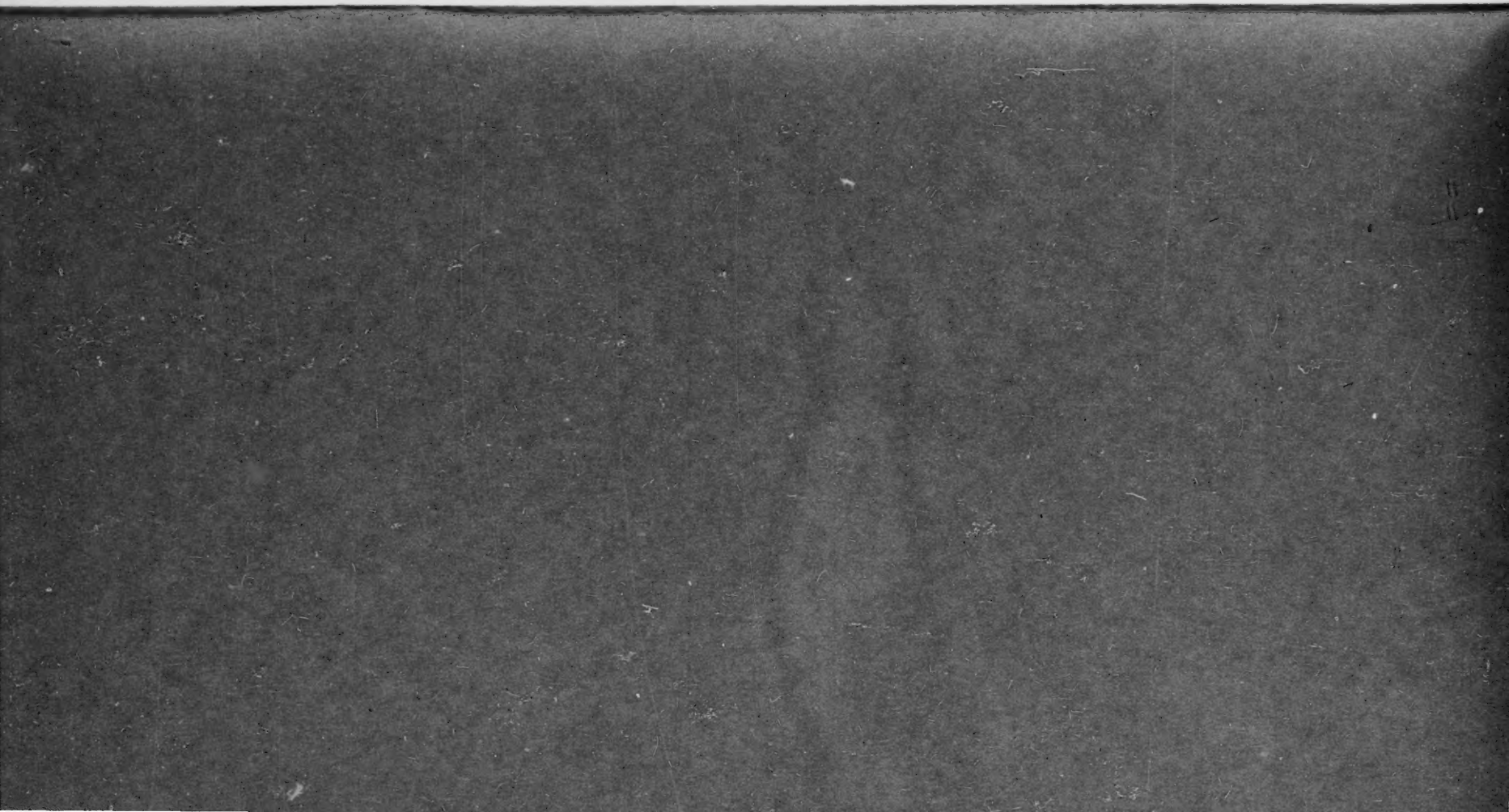

I. QUESTIONS PRESENTED BY APPELLEES MOTION TO DISMISS

A. Whether Appellants have failed to perfect a proper appeal where Appellants' question presented in its jurisdictional statement is not the issue decided by the Court of Appeals?

B. Whether any of the Appellants have standing to pursue this appeal in light of the question presented by Appellants' jurisdictional statement?

C. Whether 28 U.S.C. Section 1254(2) permits appeal of an interlocutory order to this Court?

II. QUESTION PRESENTED BY APPELLEES MOTION TO AFFIRM

Whether Appellants have raised a substantial question for review by this Court where the lower courts' decisions in this case are consistent with the decisions of this Court holding that the Fourth Amendment to the Constitution of the United States prohibits nonconsensual warrantless inspections of business premises?

PARTIES TO PROCEEDINGS BELOW

William P. Allinder and Caroline I. Allinder, plaintiffs below and appellees herein, are commercial beekeepers in the business of raising bees for honey production and crop pollination.

Elmer J. Steiner and Marilyn L. Steiner, plaintiffs below and appellees herein, are commercial beekeepers in the business of raising bees for honey production.

The State of Ohio, The Ohio Department of Agriculture, Dale Locker, Director of the Ohio Department of Agriculture and Eric Nelson, Hardin County Bee Inspector are appellants herein.

The Allinders own 600 hives and the Steiners own approximately 850 hives, all of which are located in seven northwest Ohio counties.

The parties in the Steiner action stipulated that the order entered in the Allinder case would apply in the Steiner action, and the two actions were consolidated for appeal.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to Proceedings Below	ii
Motion of Appellees To Dismiss or Affirm	1
Statutory Provision Involved	1
Statement of the Case	2
Argument	3
Conclusion	16

TABLE OF AUTHORITIES

Page

CASES

Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp., 416 U.S. 861 (1974) 11

Allinder v. Ohio, 614 F.Supp. 282 (N.D. Ohio 1985) aff'd 808 F.2d 1180 (6th Cir. 1987) ..... *passim*

Arkansas v. Sanders, 442 U.S. 753 (1979) 13

Burger King Corp. v. Rudzewicz, 105 S.Ct. 2174 (1985) 3

Camara v. Municipal Court, 387 U.S. 523 (1967) 9, 13

Chicago v. Atchison & T.S.F.R. Co., 357 U.S. 77 (1958) 8

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) 15

Donovan v. Dewey, 452 U.S. 594 (1981) 12, 14, 15

Dow Chemical Co. v. United States, — U.S. —, 106 S.Ct. 1819 (1986) 9, 11, 12, 15

Edelman v. Jordan, 415 U.S. 651 (1974) 4

Ex parte Leaf Tobacco Board, 222 U.S. 578 (1911) 5

Ex parte Young, 209 U.S. 123 (1908) 5, 6

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) 13

International Union, United Auto., Aerospace and Agr. Implement Workers of America, AFL-CIO, Local 283 v. Scofield, 382 U.S. 205 (1965) 5

Katz v. United States, 389 U.S. 347 (1967) 11

Maine v. Thornton, 466 U.S. 170 (1984) 11, 12

Mancusi v. DeForte, 392 U.S. 364 (1968) 13

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 9, 13, 15, 16

Michigan v. Tyler, 436 U.S. 499 (1978) 13

TABLE OF AUTHORITIES—Continued

Page

National Theaters Corp. v. Bertha Building Corp., 361 U.S. 960 (1960) 7

Oliver v. United States, 466 U.S. 170 (1984) 11, 12

Pacific Union Conference v. Marshal, 434 U.S. 1305 (1977) 7

See v. City of Seattle, 387 U.S. 541 (1967) 9, 13, 14

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 6

Slaker v. O'Connor, 278 U.S. 188 (1929) 8

South Carolina Electric & Gas Co. v. Fleming, 351 U.S. 901 (1956) 8

Tully v. Mobil Oil Corp., 455 U.S. 245 (1982) 3

United States v. Biswell, 406 U.S. 311 (1972) 15

United States v. Chadwick, 433 U.S. 1 (1977) 13

MISCELLANEOUS:

Report of the Study Group on the Caseload of the Supreme Court, 1972, 57 F.R.D. 573, 595-605 3

Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, Section 3920 (1977) 7

Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction*, Section 4037 (1978 and Suppl. 1986) 6

28 U.S.C. Section 1254(2) 1, 3, 4, 5, 6, 7, 16

28 U.S.C. Section 1292(a)(1) 6

Ohio Rev. Code Section 909.03 7

Ohio Rev. Code Section 909.05 ..... 2, 8, 13

Ohio Rev. Code Section 909.16 7

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the appellees William P. Allinder and Caroline I. Allinder d/b/a Sunnyside Bee Farm and Elmer J. Steiner and Marilyn L. Steiner move to dismiss this appeal or, alternatively, snummarily affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

The motion to dismiss is grounded on the fact that appellants have failed to perfect a proper appeal to the Court and appellants lack standing to pursue the question presented in their jurisdictional statement.

Further, even if appellants' Question presented is modified to correctly state an issue in dispute, other issues remaining to be decided between these parties in the United States District Court for the Northern District of Ohio, Western Division, below should be decided prior to the Supreme Court addressing the issues presented in Appellants' Jurisdictional Statement. Interlocutory decisions are not proper subjects for appeal to this Court under 28 U.S.C. § 1254(2).

Finaliy, Appellees' Motion to Affirm is based on the fact that no substantial question for review has been presented by appellants to this court.

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STATUTORY PROVISION INVOLVED

In pertinent part, 28 U.S.C. Section 1254(2) provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court by . . . a party relying on a state statute

held by the court of appeals to be invalid as repugnant to the Constitution . . . of the United States . . . and *the review on appeal shall be restricted to the federal questions presented* [emphasis added]."

STATEMENT OF THE CASE

This case involves a fourth amendment challenge to the scope of Section 909.05 of the Ohio Revised Code (ORC) which empowers the Ohio Director of Agriculture or his authorized representative to conduct warrantless searches of apiaries and other premises, buildings or places where bees or bee paraphernalia are kept.

After notification of a planned warrantless inspection of their apiaries, the plaintiff-beekeepers commenced separate actions for declaratory and injunctive relief in the United States District Court for the Northern District of Ohio. The district court granted the plaintiffs' motion for partial summary judgment in the Allinder action and permanently enjoined the Ohio Department of Agriculture from "conducting warrantless, nonconsensual inspections of apiaries pursuant to the Ohio Apiary Inspection Law, ORC Section 909.05" on the grounds that the law is unconstitutional "insofar as it purports to authorize nonconsensual apiary inspections without a warrant or its equivalent." *Allinder v. Ohio,* 614 F. Supp. 282 (N.D. Ohio 1985).

The Steiners and appellants-defendants stipulated that the order entered in the Allinder action would apply in the Steiner action, and that the two actions would be con-

solidated for purposes of appeal and trial on the remaining issues.

Defendants appealed from the injunctive orders in both cases. The Court of Appeals for the Sixth Circuit consolidated the two actions on appeal. The Court of Appeals affirmed the District Court in substantial part. *Allinder v. Ohio,* 808 F.2d 1180 (6th Cir. 1987).

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED

A. The Appellants Have Failed To Perfect A Proper Appeal To This Court Because The Question Presented In The Jurisdictional Statement Is Not The Issue Decided By The Court Of Appeals.

The appellants attempt to invoke the jurisdiction of this court pursuant to 28 U.S.C. Section 1254(2) which authorizes review by appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution of the United States.

However, when a party seeks an appeal by this method, the review on appeal shall be restricted to the federal question presented. *Tully v. Mobil Oil Corp.,* 455 U.S. 245 (1982). The restriction contained in 28 U.S.C. Section 1254(2) is consistent with the sound policy of limiting the burden of appeals heard by this Court. *See eg.* Report of the Study Group on the Caseload of the Supreme Court, 1972, 57 F.R.D. 573, 595-605; *Burger King Corp. v. Rudzewicz,* 105 S.Ct. 2174, 2181 n.12, 471 U.S. 462, 470-71 n.12 (1985).

In its Jurisdictional Statement filed with this Court, the appellants presented their singular question as follows:

> WHETHER A STATE IS PROHIBITED BY THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FROM CONDUCTING NONCONSENSUAL, WARRANTLESS ADMINISTRATIVE INSPECTIONS OF PROPERTY SUCH AS AN APIARY.

In the district court, appellees named as defendants, the State of Ohio, the Ohio Department of Agriculture, Dale Locker, Director of the Ohio Department of Agriculture and Eric Nelson, Hardin County Bee Inspector.

As the Court of Appeals for the Sixth Circuit stated:

> The Supreme Court has consistently interpreted the Eleventh Amendment to preclude a citizen from bringing suit against his own state in a federal court. *Edelman v. Jordon,* 415 U.S. 651 (1974) . . . The State of Ohio . . . must be dismissed as defendants for lack of jurisdiction.

Allinder v. Ohio, 808 F.2d at 1184.

As a result of the decision by the court of appeals below, no issue of dispute exists on the question presented by the Appellants herein since the "State" was dismissed as a party.

Since an appeal under 28 U.S.C. Section 1254(2) must be restricted to the question presented, appellants' appeal must be dismissed as presenting a question upon which there is no dispute. Appellees have not cross-appealed from the decision of the court of appeals dismissing the State of Ohio as a party over which the district court has no jurisdiction.

B. The Appellants Lack Standing To Pursue The Instant Appeal In Light Of The Question Presented In Appellants' Jurisdictional Statement.

The provisions of 28 U.S.C. Section 1254(2) clearly provide that review on appeal to this Court "shall be restricted to the Federal questions presented." The Federal question presented by appellants' jurisdictional statement precludes review by appeal in this case.

The State of Ohio and the Ohio Department of Agriculture were dismissed as parties to the case by the Court of Appeals for the Sixth Circuit. *Allinder,* 808 F.2d at 1184. Section 1254(2) permits only parties to appeal. Thus, those two (2) appellants are no longer parties to the case and cannot seek review by appeal in this Court. *See eg. Ex parte Leaf Tobacco Board,* 222 U.S. 578, 581 (1911); *International Union, United Auto., Aerospace and Agr. Implement Workers of America, AFL-CIO, Local 283 v. Scofield,* 382 U.S. 205, 208-09 (1965).

The Director of the Ohio Department of Agriculture and the Hardin County Bee Inspector were retained as proper parties to the case under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908) by the court of appeals. *Allinder,* 808 F.2d at 1184.

While the two (2) individual appellants remain parties to the action, the question presented by appellants jurisdictional statement is framed in a manner which addresses only the State of Ohio's (a non-party's) interest.

Consequently, the individual appellants (the only persons still parties to the case) have not framed an issue for this Court to determine on appeal. A suit challenging

the federal constitutionality of a state officials' action is not one against a state. *Ex parte Young* at 159-160.

The interplay of the limited appellate jurisdiction granted by 28 U.S.C. Section 1254(2) to the Federal question presented combined with the express requirement that only a party may appeal to this Court provides a sound and just reason to dismiss appellants' attempt to invoke the jurisdiction of this Court. It is the Court's long-standing policy that "statutes authorizing appeals are to be strictly construed." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984).

C. An Appeal Of An Interlocutory Decision Is Not Permitted By 28 U.S.C. Section 1254(2) Especially Where There Remain Several Issues In Dispute And For Decision In The United States District Court Below In This Case And The Supreme Court's Review, If Any, Should Be Reserved Until All Such Issues Are Decided By The District Court And Court of Appeals For The Sixth Circuit.

The appellants in this action brought their appeal of the district court's interlocutory decision in the court of appeals below pursuant to 28 U.S.C. Section 1292(a)(1).

By enacting the Interlocutory Appeals Act of 1958, Congress modified the traditional final judgment rule allowing immediate appeals to a court of appeals from a federal district court. See generally, Wright, Miller, Cooper & Gressman, *Federal Practice & Procedure: Jurisdiction* § 3920 (1977).

As such, a judgment rendered in a case arising under the Interlocutory Appeals Act is non-final in nature. *Id.*

While Congress has permitted an interlocutory appeal to a court of appeals, the Act does not require a review by this Court of such interlocutory judgments. *National Theaters Corp. v. Bertha Building Corp.*, 361 U.S. 960 (1960). History and sound policy illustrate that finality is a condition precedent to invoking the jurisdiction of 28 U.S.C. Section 1254(2). *See* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, Section 4037 (1978 and Suppl. 1986).

In this case, several substantial federal issues remain to be decided in the United States District Court below. "The policy against piecemeal interlocutory appeal is a strong one". *See Pacific Union Conference v. Marshall*, 434 U.S. 1305, 1309 (1977).

The issues yet to be ruled on by the district court include appellees-plaintiffs' request that Ohio Rev. Code Section 909.03 be declared unconstitutional to the extent that it provides authority to the Ohio Department of Agriculture to burn appellees-plaintiffs' property when less restrictive alternatives exist for the eradication of bee diseases, that Ohio Rev. Code Section 909.16 be declared unconstitutional in that it does not provide for an independent and unbiased review of the orders of the director [of agriculture] since the director reviews his own orders, and a request by the appellees to have the actions of the State of Ohio, Ohio Department of Agriculture and the Director of Agriculture in allowing competitors as bee inspectors to be declared violative of appellees' rights pursuant to the Fifth Amendment to the United States Constitution.

The substantial federal issues yet to be decided in the courts below increase the likelihood that further appeals

by the non-prevailing party may result with eventual petitions for review in this court.

Judicial economy and the favored policy of avoiding multiple appeals in the same case should control and this appeal should be dismissed. *Slaker v. O'Connor,* 278 U.S. 188, 189 (1929); *South Carolina Electric & Gas Co. v. Flemming,* 351 U.S. 901 (1956); *Chicago v. Atchison & T.S.F.R. Co.,* 357 U.S. 77, 82-83 (1958).

II. THE DECISION OF THE COURT OF APPEALS SHOULD BE SUMMARILY AFFIRMED

Appellants Have Raised No Substantial Question For Review By This Court And The Decisions In The District Court And The Court Of Appeals For The Sixth Circuit Below Are Clearly Correct And Consistent With This Court's Long Standing Interpretation Of The Fourth Amendment.

The lower courts concluded that ORC Section 909.05 was unconstitutional to the extent it authorized nonconsensual warrantless inspections of appellees' beehives in this case. The court of appeals found the statute repugnant to the Constitution because, "under ORC Section 909.05, an inspector is authorized to examine apiaries without prior notice, without a warrant and outside the presence of the owners." *Allinder,* 808 F.2d at 1183.

The appellants have failed to raise a substantial question for review by this Court where the court of appeals decision is consistent with the decisions of this Court holding that the Fourth Amendment to the Constitution of the United States prohibits nonconsensual warrantless inspections of business premises. Should this Court decide that

appellants appeal is properly before the Court, this case is one eminently appropriate for summary affirmance.

Physical invasion of a businessman's property without a warrant under facts similar to those present here has been consistently found to violate the protections guaranteed by the Fourth Amendment. "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Dow Chemical Co. v. United States,* 106 S.Ct. 1819, 1826, — U.S. — (1986) citing *See v. City of Seattle,* 387 U.S. 541, 543 (1967).

The Supreme Court of the United States has on numerous occasions determined that a search warrant is required as part of due process in administrative inspection cases and that warrantless searches are generally unreasonable. This rule applies to commercial premises as well as houses. *Camara v. Municipal Court,* 387 U.S. 523 (1967); *See v. City of Seattle, supra; Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978).

The insubstantiality of this appeal is amply demonstrated by the facts of this case which were clearly established at the district court.

The following facts indicate the correctness of the lower courts' ruling and the conformance of those rulings with this Court's past decisions:

a. Not all beekeepers in Ohio register their apiaries. *Allinder,* 808 F.2d at 1183.

b. American Foulbrood Disease (AFB) is not harmful to humans. Id.

c. Inspectors are often business competitiors of those whom they inspect. Id.

d. An inspector is expressly authorized, under O.R.C. 909.05 to examine apiaries without prior notice, without a warrant and outside the presence of the owners. Id.

e. There are no published rules and regulations on inspection and the final decision as to what to inspect, how to inspect and when to inspect rests with the individual inspectors. Id.

f. Inspection involves manipulation of the hive *and not mere visual inspection of the exterior of an apiary. The inspector . . . removes the lid* [*of the hive*] *with a crowbar-like hive tool* [emphasis added]. Id.

g. If the inspector diagnoses AFB, surrounding colonies or sometimes the entire apiary is quarantined. Id.

h. If the presence of AFB is confirmed, the bees and hive equipment are ordered destroyed by burning. Id.

The following determinations were made by the trial court and affirmed by the court of appeals:

a. The open fields doctrine does not permit a search of personal effects or of a commercial structure in a field. No known reported case has ever allowed such a search. 808 F.2d at 1185.

b. The trial court made a specific factual finding that the disputed statutory scheme did not create a pervasively regulated industry nor did the beekeeping industry have a long history of close regulation in Ohio. Id. at 1187.

c. The bee inspection statute provides too much discretion [to the inspector] and did not provide certainty, regularity or fairness. Id. at 1188.

d. Appellees had a *subjective expectation* of privacy. The Appellants-defendants failed to establish that such expectation was unreasonable. Id. at 1185.

In analyzing this case, the Court of Appeals for the Sixth Circuit, before invoking the fourth amendment, determined whether or not a search had occurred. *Dow Chemical Co. v. United States,* 749 F.2d 307, 311 (6th Cir. 1984), aff'd. — U.S. —, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986). While appellants argued that the open fields doctrine of *Oliver v. United States,* 466 U.S. 170 (1984) applied, the court of appeals found that appellants' reliance on *Oliver* was misplaced. *Allinder v. Ohio,* 808 F.2d 1180, 1184 (1987).

The court of appeals held that *Oliver* did not overrule the holding in *Katz v. United States,* 389 U.S 347 (1967), that the fourth amendment protects persons and not places. The court of appeals stated that *Oliver* focused on factors such as the "intention of the Framers of the Fourth Amendment", the uses to which a location is put and the societal understanding as to areas deserving protection from government invasion in concluding that society does not recognize an expectation of privacy in open fields as reasonable. *Oliver,* at 178-79.

In decisions following *Katz,* this Court has consistently adhered to the open fields doctrine while at the same time recognizing that it is limited in scope to "sights seen in 'the open fields.'" *Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp.,* 416 U.S. 861 (1974)

Similarly, in *Maine v. Thornton,* 466 U.S. 170 (1984), a case consolidated with *Oliver,* the officers making a visual inspection of fields spotted marijuana growing, but they

obtained a search warrant before they seized the marijuana. 466 U.S. at 174.

In *Maine,* this Court also distinguished the fourth amendment protection afforded to "effects" by limiting the term "effect" to personal rather than real property. Id. at 177 n 7.

More recently, in *Dow Chemical Co. v. United States, supra,* this Court applied the open fields doctrine to uphold the aerial observation and photography of the industrial plant complex. This Court did acknowledge that the defendant in the *Dow* case had a legitimate expectation of privacy from unreasonable government entries into its covered buildings and private commercial property while emphasizing that the observation took place "without physical entry", and that any such entry would raise "significantly different questions." 106 S.Ct. at 1825-26 (emphasis in original).

Limitations On Open Fields

There is no case where the open fields doctrine has been applied to allow a warrantless nonconsensual search of personal effects or of a commercial structure *in a field.* As a result, the appellants' attempt to extend the holding in *Oliver* beyond the open fields exception and into the realm of structures as presented in this case, must fail. As the Court of Appeals for the Sixth Circuit stated:

> To so extend the open fields exception, we would have to ignore a long line of Supreme Court cases which have extended fourth amendment protection to areas other than the home and its curtilage. Cf *Donovan v. Dewey,* 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262

1981) (stone quarry); *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) (luggage); *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct 1942, 56 L.Ed.2d 486 (1978) (store); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct 1816, 56 L.Ed.2d 305 (1978) (employee working area of business premises); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977) (office); *United States v. Chadwick*, 433 U.S. 1, 538, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (footlocker); *Mancusi v. DeForte*, 392 U.S 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968) (office); *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L Ed.2d 943 (1967) (locked commercial warehouse)

Allinder, 808 F.2d at 1185.

Inspections authorized by O.R.C. Section 909.05, and the inspections to which appellees object here, do not involve a mere visual inspection of apiaries in an open field. Rather, the disputed statute allows a warrantless inspection of "any premises, buildings, or any other place, public or private, in which [the Director of Agriculture of his authorized representatives have] reason to believe that bees, honey, wax, used hives, or used appliances are kept," except "occupied dwelling(s)." Thus, for example, it allows for an entry into any commercial structure where bee equipment is stored.

As this Court has explained, while the government may observe, without a warrant, whatever is observable by the public, areas where only employees are permitted are not "thrown open . . . to the warrantless scrutiny of Government agents." *Barlow's, Inc.*, 436 U.S. at 315. [R]easonableness is still the ultimate standard." Id. (quoting *Camara v. Municipal Court*, 387 U.S 523, 539 (1967).

The Court of Appeals for the Sixth Circuit further stated:

> Nor can the warrantless physical intrusion, manipulation and dismantling of the hives themselves be sanctioned by the visual inspection allowable under the open fields doctrine. Apiaries are commercial property. They are also personal property since they are movable and at times are moved for rental to farmers in crop pollination. As such they fall within the definition of effects in *Oliver*, 466 U.S. at 177 n. 7, 104 S.Ct. at 1740 n. 7, and are therefore expressly afforded protection by the fourth amendment . . .
>
> The apiaries are "effects" and as such are part of plaintiffs' commercial personal property. We conclude that the physical intrusion, manipulation and dismantling of the hives by a state inspector constitutes a search under the fourth amendment.

Allinder, 808 F.2d at 1186.

For nearly two decades, the Supreme Court has followed the general rule that a warrant is required before conducting an administrative search of commercial property or commercial products. *See v. City of Seattle*, 387 U.S. at 544-45. In *See*, this Court concluded that "warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises." 387 U. S. at 544.

Later decisions have limited this rule so that the fourth amendment does not prohibit all such searches, but only those that are unreasonable. *Donovan*, 452 U.S. at 599. In *Donovan*, this Court held that in certain limited situations, warrantless administrative searches of commercial property do not violate the Fourth Amendment. The Sixth Circuit has characterized these exceptions under the ra-

tionale of "the notion of implied consent." *Dow Chemical Co.*, 749 F.2d at 311 n.1; *see also, Barlow's, Inc.*, 436 U S. at 313. However, since this form of search is an exception to the warrant requirement, the burden of proof rests with the party [the appellants in this case] asserting the exception. *See Barlow's, Inc.*, 436 U.S. at 324.

Further, an exception to the warrant requirement exists for "closely regulated industries long subject to inspection" and for "pervasively regulated" businesses, *Barlow's, Inc.*, 436 U S. at 313, for which, because of the nature of the regulation, no reasonable expectation of privacy exists. *Cf. Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (Premises of retail dealer in liquor); *United States v. Biswell*, 406 U.S. 311 (1972) (pawn shop).

The district court and court of appeals in this case determined the statute involved herein does not pervasively regulate the beekeeping industry. *Allinder v. Ohio*, 808 F.2d at 1187.

In *Donovan*, 452 U.S. at 604, this Court acknowledged another exception to the warrant requirement by indicating a warrantless search is permissible if a statute "establishe(s) a predictable and guided federal regulatory presence." *See also Dow Chemical*, 749 F.2d at 311 n. 1. The court of appeals determined that said regulatory scheme did not exist in this case. 808 F.2d at 1187.

The appellants also raised the administrative burden which requiring warrants would place on them. The trial court rejected this argument based upon a rejection of the same argument in *Barlow's, Inc.*, 436 U.S. 307.

Finally, appellants utilize business competitors of the beekeepers whom they inspect. The lower courts concluded that the requirement of a warrant was necessary to protect appellees herein. *Allinder,* 808 F.2d at 1188. The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. *Barlow's, Inc.,* at 312.

—o—

CONCLUSION

In summary, this appeal should be dismissed. Appellants have failed to present a proper question for appeal pursuant to 28 U.S.C. Section 1254(2). Similarly, the appellants lack standing to assert the question presented in their jurisdictional statement. Moreover, the appellants seek review by this Court of an interlocutory decision. The strict construction of Section 1254(2) consistently applied by this Court mandates that this appeal be dismissed.

Finally, appellants have failed to present a substantial question for review by this Court regardless of whether their jurisdictional statement is treated as an appeal or a petition for a writ of certiorari. The lower courts' decisions in this case are consistent with long established precedent. No purpose would be served by a plenary review of this case. Consequently, the appeal should be dismissed or, alternatively, the decision of the United

States Court of Appeals for the Sixth Circuit should be summarily affirmed.

Respectfully submitted,

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